[TITLE]

THE PROHIBITION OF THE USE OF FORCE AS *JUS COGENS*: EXPLAINING APPARENT DEROGATIONS

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Abstract

The prohibition of the use of force is generally considered to be a jus cogens *rule, which would mean it does not permit derogation, neither by consent nor by treaty. Yet multiple apparent derogations from the prohibition exist: Articles 42 and 51 of the UN Charter, Articles 105, 110 and 111 of the UNCLOS, and other treaties all permit uses of force, and ad hoc consents to use force are common. This article explains how this can be legally valid, by reference to the distinctions between derogations, exceptions, and scope.*

1. INTRODUCTION AND OUTLINE

The prohibition of the use of force is often said to be a *jus cogens* rule, and *jus cogens* rules prohibit derogation. The aim of this article is to explain how the customary international law prohibition of the use of armed force can be a *jus cogens* rule despite the existence of several apparent derogations. The article identifies five such apparent derogations from the prohibition:

- Article 51 United Nations (UN) Charter[1] regarding self-defence.
- *Ad hoc* consents to the use of force.
- The UNCLOS'[2] provisions permitting the use of force on the high seas.
- Article 42 UN Charter regarding the Security Council's (UNSC) power to authorise use of force.
- Other treaties permitting use of force.

The article distinguishes between derogations, exceptions, and scope, on the assumption that what is covered by an exception from or is outside the scope of the prohibition cannot be the subject of a derogation from it. These distinctions make it possible to classify apparent derogations from the prohibition of the use of force as exceptions or as being outside its scope, and thus as valid despite the prohibition being *jus cogens*.

More specifically, Article 51 UN Charter reflects an exception from the customary prohibition, while consent and the UNCLOS provisions are outside the scope of the prohibition. The validity of the other treaties is disputed, and therefore do not necessarily have an explanation. There are (at least) eight competing possibilities for explaining the validity of the Article 42 UN Charter. The conclusion is that the question remains open, that the most plausible explanation is that use of force authorised by the UNSC is outside the scope of the prohibition, and that those who claim that the prohibition is *jus cogens* can and should give the explanation(s) that they consider the most plausible. The choice of explanation for the legality of Article 42 UN Charter will affect the validity of other treaties that apparently authorise the use of force, most importantly Article 4(h) Constitutive Act of the African Union.

Beyond this introductory section, the article is divided into six further sections. Section 2 concerns the effects *jus cogens* rules, the most important one being to prohibit derogation.

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[1] *UNCIO* XV, 335; amendments by General Assembly Resolution in *UNTS* 557, 143/638, 308/892, 119.
[2] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 *UNTS* 3 (UNCLOS).

Section 3 discusses the customary prohibition's *jus cogens* status. Section 4 presents the distinction between derogations, exceptions and scope. Section 5 discusses apparent derogations from the customary prohibition, and explains how they are actually not derogations. Section 6 discusses the UN Charter 42 specifically, and presents eight possible explanations for why it is not a derogation. Section 7 is a conclusion.

2. THE EFFECTS OF *JUS COGENS*

2.1 **Introduction**

Jus cogens rules are presumably (a special category of) customary international law.[3] This is not entirely clear, however. *Jus cogens* may be 'distinct' from customary international law,[4] by being ultimately grounded in natural law or something similar.[5]

In the present article, *jus cogens* will be considered a form of customary international law. This means that it is created in the same way as regular customary law, i.e., through state practice and *opinio juris*.[6] *Jus cogens* rules are created when relevant state practice and *opinio juris* show that a rule is considered peremptory.[7]

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[3] H. Thirlway, 'The Sources of International Law', in M. Evans, ed., *International Law*, 3rd edn., (Oxford, Oxford University Press 2010) p. 95 at p. 119; M. Dixon, *International Law*, 7th edn. (Oxford, Oxford University Press 2013) p. 41; U. Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?', 18 *EJIL* (2007) p. 853 at p. 860; U. Linderfalk, 'The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law', 82 *Nordic JIL* (2013) p. 369 at pp. 378-384; A. Hoogh, *Obligations Erga Omnes and International Crimes. A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (The Hague, Kluwer Law International 1996) p. 45.

[4] The Committee on the Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law* (2000) para. 8 notes this possibility. A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press 2006) pp. 108-111 apparently thinks this is plausible.

[5] M. Weisburd, 'The Emptiness of the Concept of Jus Cogens as Illustrated by the War in Bosnia-Herzegovina', 17 *Michigan JIL* (1995) p. 1 at p. 30 finds neither a positivist nor a natural law approach attractive. M. Saul, 'Identifying *Jus Cogens* Norms: The Interaction of Scholars and International Judges', *Asian JIL* (FirstView Article, May 2014) p. 1 at pp. 5-8 distinguishes between three possibilities: 'natural law', 'public order', and 'customary international law'.

[6] Cf. Art. 38(1)(b) Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945), 33 *UNTS* 993. Linderfalk 2013, *supra* n. 3, pp. 374-375 distinguishes between 'first order' and 'second order' components of *jus cogens*, showing that neither type has to be created in a different manner than regular customary international law. To the contrary, A. Clapham, *Brierly's Law of Nations*, 7th edn. (Oxford, Oxford University Press 2012) p. 62 says that the creation of *jus cogens* does not require evidence of general practice.

[7] Thirlway, *supra* n. 3, suggests that its creation is similar to the creation of customary international law. R. Kolb, 'The Formal Source of Ius Cogens in Public International Law', 53 *Zeitschrift für öffentliches Recht* (1998) p. 69, concludes at p. 103 that *jus cogens* can emanate from treaties, customary international law or general principles, but that it is in any case created through inter-state consensus.

The following subsections will discuss the effects of a rule having *jus cogens* status, with a distinction between the main effect (*infra* 2.2) and other effects (*infra* 2.3).

2.2 Main effect of *jus cogens*: prohibits derogation

That a rule is *jus cogens* primarily means that states cannot derogate from it, neither by an ad hoc consent nor by a permanent treaty. This follows from the VCLT[8] and the International Law Commission's (ILC) Draft Articles on State Responsibility (DARS).[9]

The relevant articles of the VCLT will be assumed to reflect customary international law, and thus be relevant to States that are not party to the convention. DARS were drafted by the ILC and 'taken note of' United Nations General Assembly,[10] and do not constitute a source of international law per se. They are used here on the assumption that the relevant articles reflect customary international law. According to their Article 59 they are 'without prejudice to' the Charter of the United Nations, but that has no bearing on the present discussion, which concerns the customary prohibition and not the similar rule in Article 2(4) UN Charter.

Under the VCLT, the general rule in Article 30 is that any treaty rule can be derogated from by a subsequent treaty. The same freedom applies to treaties derogating from regular customary international law. Article 53 VCLT defines a 'peremptory' (i.e., *jus cogens*) rule as one 'from which no derogation is permitted'. This means that a new treaty conflicting with an existing *jus cogens* norm will be invalid. This is supplemented by Article 64, which says that an existing treaty conflicting with a new *jus cogens* norms will be invalid.

Article 20 DARS says that any rule can be derogated from by consent, but Article 26 limits this by saying that it does not apply to *jus cogens* rules.

With regard to the prohibition of use of force, this means that a treaty between two states agreeing to use force against a third state would not merely be illegal to fulfil (as would agreements that are contrary to any existing obligation), but be invalid.[11]

2.3 Other effects of *jus cogens*

There are also other, more peripheral effects of a rule having *jus cogens* status.

A treaty reservation that is contrary to a *jus cogens* rule will be invalid, in the same way as a regular treaty provision.[12] This is logical: What one cannot validly do in a treaty, one cannot validly do in a reservation to a treaty.

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[8] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 *UNTS* 331 (VCLT).

[9] Annex to GA Res. 56/83, 28 January 2002.

[10] GA Res. 56/83, 28 January 2002.

[11] Y. Dinstein, *War, Aggression and Self-Defence*, 5th edn. (Cambridge, Cambridge University Press 2011) paras. 285-286. G. Christenson, 'The World Court and Jus Cogens', 81 *AJIL* (1987) p. 93 at p. 96 seems to assume that the primary consequence of the prohibition being *jus cogens* is that states cannot agree to use of force towards a third state. This, however, follows from the prohibition itself, regardless of its *jus cogens* status (see O. Spiermann, 'Humanitarian Intervention as a Necessity and the Threat or Use of *Jus Cogens*', 71 *Nordic JIL* (2002) p. 523 at p. 535).

Articles 40-41 DARS impose obligations on third states with regard to 'serious breaches' of *jus cogens* rules. 'Third states' is used here to describe states that not 'injured States' as defined by Article 42 DARS. With regard to violations of non-*jus cogens* rules, third states may have *rights* (Art. 48 DARS). This is the case if a violated rule is 'established in the collective interest' or is *erga omnes*, i.e., 'owed to the international community as a whole'. Articles 40-41 are unique in imposing *obligations* on third states. Third states are obliged to 'cooperate to bring an end' to the violations, and may not 'recognise as lawful … nor render aid or assistance in maintaining' their outcome.

According to Article 50 DARS, certain rules cannot be violated as countermeasures. One of the categories it lists is 'peremptory norms', i.e., *jus cogens* rules (Art. 50(1)(d)). With regards to the customary prohibition of the use of force, this means that use of force cannot be a legal countermeasure. In addition, Article 50(1)(a) says that countermeasures shall not affect 'the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations', meaning that force cannot be a legal countermeasure of regardless of the prohibition's *jus cogens* status.

Article 26 DARS also prevents 'circumstances precluding wrongfulness' from applying to *jus cogens* rules. These circumstances are listed in Articles 20-26, and comprise consent, self-defence, countermeasures, force majeure distress, and necessity. The significance of self-defence and consent with regard to the customary prohibition of the use of force will be discussed in 5.2 and 5.3 *infra*.

It is also possible that a rule's status as *jus cogens* can affect the content of other rules of international law. For example, it has been suggested that there should be no state immunity for violations of *jus cogens* rules,[13] and that universal jurisdiction should cover such violations.[14] This would make it simpler to prosecute violations of *jus cogens* rules in domestic legal system. Universal jurisdiction and lack of immunity does not, however, have to be strictly tied to *jus cogens*. It would be possible to permit universal jurisdiction over violations of (certain) non-*jus cogens* rules, and there may similarly be exceptions from state immunity for violations of the same rules.

Jus cogens rules may also exclude the possibility of being exempt from a rule based on 'persistent objection'.[15]

Jus cogens status may also have more practical consequences. One possibility is a 'compliance pull',[16] i.e., that *jus cogens* rules are less likely to be violated due to their unique status and inherent moral force.

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[12] ILC, *Guide to Practice on Reservations to Treaties* (2011) para. 4.4.3, section 2; Linderfalk 2007, *supra* n. 3, p. 868; A. Cassese, *International Law*, 2nd edn. (Oxford, Oxford University Press 2005) p. 207.

[13] Orakhelashvili, *supra* n. 4, chapter 10; Cassese, *supra* n. 12, p. 208; L. McGregor, 'State Immunity Jus Cogens', 55 *ICLQ* (2006) p. 437. The ICJ has so far not accepted such arguments; see *Jurisdictional Immunities of the State* (*Germany* v. *Italy: Greece intervening*), Judgment of 3 February 2012, paras. 92-97, and *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo* v. *Belgium*), Judgment, *ICJ Reports* (2002) p. 3, paras. 56-61.

[14] Orakhelashvili, *supra* n. 4, chapter 9; Cassese, *supra* n. 12, p. 208.

[15] E.g., V. Lowe *International Law* (Oxford, Oxford University Press 2007) p. 58.

[16] J. Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force', 32 *Michigan JIL* (2011) p. 215 at p. 256; Cassese, *supra* n. 12, p. 207.

Like other customary law rules, *jus cogens* rules may change over time.[17] A *jus cogens* rule may also be more difficult to change, since the regular method of changing customary international law may be ineffectual.[18] Changing it may require 'almost unanimous agreement and very weighty evidence of *opinio juris*',[19] which is a higher threshold than is required to create or change regular customary international law.

3. THE PROHIBITION IS (PRESUMABLY) *JUS COGENS*

Article 2(4) UN Charter prohibits 'the threat or use of force'. The prohibition is concurrent with a distinct prohibition with the same content in customary international law.[20] The subject of this article is possible derogations from the customary prohibition. Article 2(4) UN Charter will be an important part of the analysis in several places.

The prohibitions cover both 'use' and 'threat of use' of force. The customary prohibition of the use of force is often claimed to be a rule of *jus cogens* status. The customary prohibition of the *threat of* use of force is generally not.[21] The claim that the customary prohibition of the use of force is *jus cogens* is commonly repeated in literature,[22] and, more occasionally, by states.[23]

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[17] Spiermann, *supra* n. 11, p. 538 notes that 'In principle, rules may be changed although they possess a peremptory character' and similarly ILC, *ILC Yearbook* (1966-II) p. 248: 'it would clearly be wrong to regard even rules of jus cogens as immutable and incapable of modification in the light of future developments'.

[18] Green, *supra* n. 16, pp. 236-241; Orakhelashvili, *supra* n. 4, chapter 2 (with further references).

[19] Dixon, *supra* n. 3, p. 42. Green, *supra* n. 216, pp. 236-241 and N. Schrijver, 'Challenges to the Prohibition to Use Force: Does the Straitjacket of Article 2(4) UN Charter Begin to Gall Too Much?', in N. Blokker and N. Schrijver, eds., *The Security Council and the Use of Force: Theory and Reality–- A Need for Change?* (Leiden, Martinus Nijhoff 2005) p. 31 at pp. 39-43 discuss the possibility that the rule's *jus cogens* status may be undermined by changes that are more rapid than a *jus cogens* rule could permit.

[20] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Merits, Judgment, *ICJ Reports* (1986) p. 14, paras. 188-192.

[21] According to M. Wood, 'Use of Force, Prohibition of Threat', in R. Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2008-, online edition), <www.mpepil.com> (hereinafter MPEPIL online), para. 12 (visited on 22 November 2013), that rule is not *jus cogens*. Green, *supra* n. 16, pp. 225-229 seems to agree.

[22] E.g., C. Gray, 'The Use of Force and the International Legal Order', in Evans, ed., *supra* n. 3, p. 615 at p. 617; Dixon, *supra* n. 3, p. 42; J. Crawford, *Brownlie's Principles of Public International Law*, 8th edn. (Oxford, Oxford University Press 2012) p. 596; Lowe, *supra* n. 15, p. 59; J. Frowein, 'Ius Cogens', MPEPIL online, paras. 6 and 8 (visited on 22 November 2013); DARS with commentaries (2008) p. 85; ILC, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (2006) para. 33 (hereinafter ILC Fragmentation); O. Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, translated edn. (Oxford, Hart Publishing 2010) pp. 200-213. Green, *supra* n. 16, fn. 4 and A. Randelzhofer and O. Dörr, 'Article 2 (4)', in B. Simma, et al., eds., *The Charter of the United Nations: A Commentary*, Vol. I, 3rd edn. (Oxford, Oxford University Press 2012) p. 200, fn. 182 give further examples.

[23] Green, *supra* n. 16, pp. 245-252 has an overview.

Some writers note that claim is problematic.[24] There is an inherent contradiction in a *jus cogens* rule that allows derogations, which the prohibition of the use of force apparently does (*infra* 4 and 5).[25] There is also the more practical difficulty of determining which of the detailed rules in the prohibition of the use of force that can be considered *jus cogens*.[26] This latter issue arises, however, already with the claim that the prohibition is part of (regular) customary law. That the prohibition seems to change faster than its *jus cogens* status should suggest is also an issue.[27] In short, how the prohibition of the use of force can be *jus cogens* 'has not been well articulated'.[28] Some attempts will be examined in 5 and 6 *infra*.

Whether the International Court of Justice (ICJ) has endorsed the claim is debatable. In the *Nicaragua* decision, the Court's majority held that

> 'A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by state representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*"…'[29]

The Court thus noted that others had referred to the prohibition as *jus cogens*, and apparently adopted this position itself.[30] The distinction between *jus cogens* and (regular) customary international law had, however, no direct bearing on the Court's resolution of the case.

The ICJ has been less equivocal in several separate or dissenting opinions, including Judge Schwebel in the *Nicaragua* case,[31] Judge Simma and Judge Kooijmans in the *Oil*

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[24] DARS with commentaries, *supra* n. 22, p. 85 touches on the problem: '[I]n applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose.' A. Paulus, '*Jus Cogens* in a Time of Hegemony and Fragmentation', 74 *Nordic JIL* (2005) p. 297, fn. 29 observes that this 'raises doubts as to the jus cogens nature of the prohibition on aggression altogether'.

[25] Green, *supra* n. 16, pp. 229-230.

[26] Green, *supra* n. 16, pp. 231-236.

[27] Green, *supra* n. 16, p. 241; N. Schrijver, 'Article 2(4)', in J-P. Cot, A. Pellet and M. Forteau, eds., *La Charte des Nations Unies*, 3rd edn. (Paris, Economica 2005) p. 437 at p. 461.

[28] Crawford, *supra* n. 22, p. 35.

[29] *Nicaragua*, *supra* n. 20, para. 190.

[30] Green, *supra* n. 16, p. 223 thinks it did. So do M. Byers, 'Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes* Rules', 66 *Nordic JIL* (1997) p. 211 at p. 215; Orakhelashvili, *supra* n. 4, p. 42, fn. 38; Christenson, *supra* n. 11, p. 93. D. Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility', 96 *AJIL* (2002) p. 833 at p. 843 is sceptical.

[31] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Jurisdiction and Admissibility, Judgment, *ICJ Reports* (1984) p. 392, Dissenting Opinion of Judge Schwebel, at para. 88.

Platforms case,[32] and Judge Elaraby in the *Palestinian Wall* case,[33] all of whom have proclaimed the customary prohibition to be *jus cogens*.

In the *Barcelona Traction* judgment,[34] the ICJ has noted that the prohibition on 'aggression'[35] is *erga omnes*, which means that any state may invoke a violation of it.[36] This has no bearing on whether prohibitions of use of force and/or aggression are *jus cogens*, since not all erga omnes rules are *jus cogens*.[37]

An important premise for the present discussion is that states are still bound by existing customary rules after concluding a new treaty with the same content.[38] This means that states that are parties to the UN Charter are still bound the (*jus cogens*) customary prohibition of the use of force. This means that apparent derogations from the prohibitions must be in conformity not only with the UN Charter, but also with the (*jus cogens*) customary prohibition. It also means that the apparent derogations contained in the UN Charter itself, i.e., Articles 42 and 51, must be in conformity with the customary prohibition.[39]

The practical relevance of the customary prohibition, despite the existence of Article 2(4) UN Charter, also follows from its *jus cogens* status: If derogations are not in conformity with it, they are void (see *infra* 2.2) and not just contrary to a treaty (the UN Charter).

4. TERMINOLOGY: DEROGATIONS, EXCEPTIONS, AND SCOPE

Before examining apparent derogations from the customary prohibition of the use of force, three important terms must be explained: 'derogations', 'exceptions', and 'scope'.

'Derogations' can be defined as 'limitations on the scope of something'.[40] In the context of international law, derogations are specific acts or rules that diverge from and supplant the content of a more general rule. This is done by treaty or by consent.

An 'exception' can be defined as 'a special situation excluded from the coverage of an otherwise applicable rule'.[41] If rule A covers, among other things, situation X, there may nonetheless be a rule B saying that X is to be exempt from the scope of rule A. In that example, rule B would be an exception from rule A. Exceptions can be distinguished from derogations by

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[32] *Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), Judgment, *ICJ Reports* (2003) p. 161, Separate Opinion of Judge Simma, at para. 6, and Separate Opinion of Judge Kooijmans, at para. 46.
[33] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* (2004) p. 136, Separate Opinion of Judge Elaraby, at para. 3.1.
[34] *Barcelona Traction, Light and Power Company, Limited*, Judgment, *ICJ Reports* (1970) p. 3.
[35] See *infra* 6.6.
[36] *Barcelona Traction*, *supra* n. 34, paras. 33-34.
[37] Hoogh, *supra* n. 3, pp. 55-56 nonetheless suggests that the judges also had '*jus cogens* in mind'.
[38] *Nicaragua*, *supra* n. 20, para. 179.
[39] The prohibition of the use of force may not have been *jus cogens*, or even existed, when the UN Charter was adopted. Its *jus cogens* status may have been confirmed by the adopted of the Definition of Aggression (GA Res. 3314 (XXIX), 14 December 1974) by the UN General Assembly in 1970 (i.e. after the adoption of the VCLT). Even so, a subsequently created *jus cogens* rule will invalidate a contrary older treaty rule, according to the Art. 64 VCLT.
[40] J. Clapp, *Random House Webster's Dictionary of the Law* (New York, Random House 2000) p. 135.
[41] Clapp, *supra* n. 40, p. 169.

their level of generality. An exception is at the same level of generality as the rules it modifies. A treaty rule will typically contain its exceptions in the treaty itself, or at least in a source of law that is binding on the parties to the treaty. The application of a derogation, on the other hand, will be limited to some of the parties that are bound by the rule in question; a 'derogation' between all parties is should rather be considered an exception.

All legal rules have a (more or less clearly) defined scope. There will necessarily be much that is not covered by a given rule. Derogations or exceptions from a rule are not necessary for matters that are outside the scope of the rule. If rule A only applies to X and Y, it does not apply to Z.

Exceptions limit the scope of rules. This means that an apparent derogation that is covered by an exception is not a derogation, since it regulates something that is outside the scope of the rule. For example, rule A prohibits X, Y and Z, but has an exception in rule B that says it does not cover Y. If two states conclude a treaty that allows Y between them, the treaty is not a derogation from rule A. Nor is the treaty a derogation if rule A by its scope covers only X and Z.

Jus cogens rules prohibit derogation. They may contain exceptions.[42] They will in any case have a defined scope. The following section examines apparent derogations from the customary prohibition of the use of force, to determine whether they are in fact derogations rather than being covered by exceptions or being outside the scope of the prohibition.

5. APPARENT DEROGATIONS FROM THE PROHIBITION

5.1 **Introduction**

This section discusses various rules that permit use of force that would otherwise be contrary to Article 2(4) UN Charter and/or the customary prohibition of the use of force. If the customary prohibition is *jus cogens*, these rules should be invalid unless they can be classified as exceptions or as being outside the scope of the prohibition rather than as derogations from it.

The following rules are discussed:

- Self-defence (*infra* 5.2)
- Consent (*infra* 5.3)
- UNCLOS provisions (*infra* 5.4)
- Article 42 UN Charter (*infra* 5.5)
- Other treaties (*infra* 5.6)
- Other exceptions (*infra* 5.7)

5.2 **Self-defence: reflects customary exception**

Article 51 UN Charter allows for the use of force in self-defence against an 'armed attack'. The exact extent of the right to self-defence is debated, e.g., concerning the concept of 'anticipatory'

[42] Spiermann, *supra* n. 11, p. 538. Under the terminology used by Linderfalk 2013, *supra* n. 3, pp. 374-375, exceptions from *jus cogens* rules are part of their 'first order'.

or 'pre-emptive' self-defence,[43] but the right's existence is not in doubt. Such use of force would *prima facie* be contrary to the customary prohibition of the use of force, which would make Article 51 a treaty based derogation from the customary prohibition.

However, the customary prohibition has an exception for self-defence. This is implied by Article 51 when describing the right to self-defence is 'inherent', and has been confirmed by the ICJ.[44] Since the use of force contemplated by Article 51 is covered by an exception from the customary prohibition, Article 51 is not a derogation from it.

5.3 Consent: outside scope

Ad hoc consent to use force on the territory of a consenting state is quite common.[45] That such use of armed force can be legal is rarely contested.[46]

Use of the force based on consent is outside the scope of the customary prohibition. This might be inferred from the words 'against the territorial integrity or political independence of any state', and is in any case widely assumed by writers.[47] It being outside the scope also seems to be a logical necessity, if use of force based on consent is to be legal at all: Article 103 UN Charter prohibits derogation through treaty or consent from Article 2(4).[48] The UN Charter does not contain an explicit exception for consent. Thus if use of force based on consent shall be in conformity with the UN Charter, it must be outside the scope of Article 2(4). The prohibition in

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[43] T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge, Cambridge University Press 2010) chapter 4. This has no bearing on the present discussion.
[44] *Nicaragua*, *supra* n. 20, para. 193. See also Orakhelashvili, *supra* n. 4, p. 72; A. Orakhelashvili, 'Changing Jus Cogens through State Practice? – the Case of the Prohibition of the Use of Force and its Exceptions', SSRN <ssrn.com/abstract=2084829> (2013), at p. 6; Linderfalk 2007, *supra* n. 3, p. 860. Green, *supra* n. 16, pp. 229-236 discusses self-defence alongside the UNSC's powers as *prima facie* contrary to the prohibition's *jus cogens* status. This seems unnecessary, since self-defence has a much more straightforward explanation (compare the current section with 6 *infra* regarding the UNSC's powers).
[45] Examples are listed, e.g., by A. Deeks, 'Consent to the Use of Force and International Law Supremacy', 54 *Harv. ILJ* (2013) p. 12.
[46] See, e.g., Dixon, *supra* n. 3, pp. 333-334, noting that such use of force is legal. It nonetheless seems that Dinstein, *supra* n. 11, paras. 288-289 contests this.
[47] E.g., A. Abass, 'Consent Precluding State Responsibility: A Critical Analysis', 51 *ICLQ* (2004) p. 211 at p. 224; T. Christakis and K. Mollard-Bannelier, 'Volenti non fit injuria?: Les effets du consentment à l'intervention militaire', 50 *AFDI* (2004) p. 102 at p. 111. Spiermann, *supra* n. 11, p. 535 notes that 'if two states enter into a treaty sanctioning the use of force by one of them against the other, use of force is a misnomer and the treaty is not contrary to Article 2(4)'. Randelzhofer and Dörr, *supra* n. 22, paras. 67-68 and O. Dörr, 'Use of Force, Prohitibtion of', MPEPIL online, para. 33 (visited on 18 November 2013) both write that the jus cogens consequences can only apply 'to treaties which actually are in contradiction to the prohibition, thus excluding those treaties to which the State concerned has validly consented'. Cassese, *supra* n. 12, p. 369 refers to how states claim that consent preclude the applicability of Art. 2(4) UN Charter.
[48] See A. Paulus and P. Leiß, 'Article 103', in Simma, et al., eds, *The Charter of the United Nations: A Commentary*, Volume II, 3rd edn. (Oxford, Oxford University Press 2012), p. 2110.

Article 2(4) presumably correlates with the customary prohibition of the use of force.[49] If so, use of force based on consent will also be outside the scope of the customary prohibition.

The normal structure of rules of international law is that a primary rule has a given content (for example prohibiting the use of force), while a secondary rule permits the primary rule to be derogated from by consent (Art. 20 DARS), unless the primary rule is a *jus cogens* rule (Art. 26 DARS).[50] That use of force based on consent is outside the scope of the prohibition of the use of force means that the legality of using force based on consent is inherent in the primary rule rather than being a secondary rule.[51] This is an unusual structure, but it is not unprecedented. Necessity is normally regulated by a secondary rule (Art. 25 DARS). In the case of the prohibition of use of force, however, necessity is part of the primary rule, which means the secondary rule does not apply.[52] The same structure underlies self-defence as an exception from the prohibition of the use of force: The legality of using force in self-defence is a primary rule in Article 51 UN Charter and in customary law (see 5.2 *infra*). Since consent and self-defence is exhaustively dealt with on the primary rule level, the primary rules are not supplemented by the similar secondary rule in Art. 21 DARS, which permits what would otherwise be violations of international law in cases of self-defence ('in conformity with the UN Charter').[53] The secondary rules on necessity and self-defence are applicable to most rules of international law, but not to the prohibition of the use of force.

5.4 **UNCLOS provisions: outside scope**

Articles 105, 110, and 111 UNCLOS allow for the use of force on or against a ship or aircraft registered in another state in certain situations.[54]

Article 105 allows the 'seizure' of 'a pirate ship or aircraft'. Article 107 presupposes that the seizure is performed by 'warships or military aircraft' (or similar vessels). Article 110 prescribes a right for warships to board ('visit') ships suspected to be involved in certain activities. The right does not apply to ships that are 'entitled to complete immunity in accordance with articles 95 and 96', i.e., warships and governmental non-commercial ships. Article 111 gives a right to 'hot pursuit', i.e., to exercise jurisdiction over ships that are pursued beyond a

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[49] As asserted by, e.g., by the ICJ in *Nicaragua*, *supra* n. 20, paras. 181 and 188, and *Palestinian Wall*, *supra* n. 33, para. 87; Orakhelashvili, *supra* n. 44, p. 6; M. Bothe, 'Terrorism and the Legality of Pre-emptive Force', 14 *EJIL* (2003) p. 227 at p. 232. Randelzhofer and Dörr, *supra* n. 22, paras. 64-66 list further references.

[50] Although the distinction between 'primary' and 'secondary rules' is problematic in international law, as discussed by U. Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology –The Role of Language for an Understanding of the International Legal System', 78 *Nordic JIL* (2009) p. 53; E. David, 'Primary and Secondary Rules', in J. Crawford, et al., *The Law of International Responsibility* (Oxford, Oxford University Press 2010) p. 27.

[51] This is asserted by ILC, *Second Report on State responsibility by Mr. James Crawford, Special Rapporteur, Addendum* (1999) para. 240.b. This has 'not been called into question' according to Corten, *supra* n. 22, p. 253.

[52] DARS with commentaries, *supra* n. 22, p. 84.

[53] DARS with commentaries, *supra* n. 22, para. 1 of commentaries to Art. 21.

[54] Moreover, Art. 73 gives some limited enforcement rights in the high seas.

maritime zone where the pursuing state has jurisdiction.[55] This too can only be done by 'warships or military aircraft' (or similar vessels).

A state has flag state jurisdiction over ships flying its flag (Art. 92(1) UNCLOS), and may thus freely seize, pursue, or board these ships in maritime zones where no other state has jurisdiction. Articles 105, 110 and 111 only concern the boarding of ships flying foreign flags in such zones.

Some, or even all, uses of force against ships based on Articles 105, 110, and 111 can be seen as too minor to be above the threshold of the prohibition of the use of force, and be outside its scope already on this basis. For example, the force can be classified as 'police actions' as distinct from the use of force. If so, there is no potential conflict with the *jus cogens* prohibition of the use of force.

Another question is whether the use of force on or against ships, as opposed to territory, is generally within the scope of the customary prohibition of the use of force. That is at least a plausible conclusion.[56] It was assumed by the Permanent Court of Arbitration's UNCLOS Chapter VII arbitration of *Guyana and Suriname*. The tribunal did not base its reasoning on specific provisions of the UNCLOS, but found that Suriname's actions 'constituted a threat of the use of force in contravention of the Convention, the UN Charter and general international law'.[57] This must mean that it assumes that the general prohibition of the use of force can also be violated against ships. The US claimed in the *Oil Platforms* case that Iran had not only violated the prohibition of the use of force, but also committed an armed attack by hitting a US flagged ship with a missile and by laying a mine that struck a US warship. The ICJ did 'not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence'' (but rejected the US claim due to insufficient evidence).[58] The Permanent Court of International Justice stated in the *Lotus* judgment that 'a ship on the high seas is assimilated to the territory of the State the flag of which it flies … a ship is placed in the same position as national territory'.[59] The UN General Assembly's resolution on the Definition of Aggression mentions attacks on 'sea or air forces, or marine or air fleets' as potential aggression.[60]

As with use of force based on consent, the UN Charter has no explicit exception for the uses of force that Articles 105, 110 and 111 UNCLOS envisage. The UNCLOS provisions must thus either be outside the scope of the customary prohibition and Article 2(4) UN Charter, or be contrary to the Article 103 UN Charter. Since there is little doubt of the validity of the UNCLOS provisions, the conclusion must be that the use of force that they permit is outside the scope of Article 2(4) UN Charter and of the customary prohibition.[61]

5.5 **Article 42 UN Charter: requires explanation**

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[55] H. Caminos, 'Hot Pursuit', MPEPIL online, para. 1 (visited on 22 November 2013).
[56] It is assumed by Dörr, *supra* n. 47, paras. 24 and 39.
[57] *Guyana and Suriname*, Award of the Arbitral Tribunal 17 September 2007, para. 445.
[58] *Oil Platforms*, *supra* n. 32, para. 72.
[59] *S.S. Lotus* (*France* v. *Turkey*), 1927 *PCIJ (ser. A)* No. 10 (Sept. 7), p. 25.
[60] Art. 3(d) Art. 1 GA Res. 3314, *supra* n. 39, Annex..
[61] Dörr, *supra* n. 47, para. 39. Randelzhofer and Dörr, *supra* n. 22, para. 41 suggest that this conclusion may be based on the words 'against the territorial integrity or political independence of any state' in Art. 2(4).

Article 42 UN Charter, in conjunction with Articles 39 and 25 allows the UNSC to authorise the use of armed force against UN member states.[62] Article 42 allows the Council to 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. Article 39 requires that it first determine 'the existence of any threat to the peace, breach of the peace, or act of aggression'. Under Article 25 the resulting decision is binding on all UN members. The legality of using armed force on the basis of and within the limits of resolutions from the UNSC is not contested.

Since Article 42 UN Charter is part of the UN Charter itself, the reasoning involving Article 103 that was applied to consent and the UNCLOS in 5.3 and 5.4 supra is not applicable. It could, like self-defence (*supra* 5.2), reflect a customary exception from the prohibition, but that conclusion is less straightforward than it is for self-defence (see *infra* 6.2). The provision thus looks like a treaty-based derogation from the prohibition of the use of force.[63] This should be contrary to the *jus cogens* prohibition of the use of force, and thus invalid. However, it is evidently considered perfectly valid. Possible explanations for this are discussed in 6 *infra*, where the goal is to find 'the simplest law that can be reconciled with our experiences'.[64]

5.6 **Other treaties: validity disputed**

Several treaty provisions beside the UN Charter have authorised using force. They include Article IV Cyprus Treaty of Guarantee,[65] Article 4 Franco-Monegasque treaty,[66] Article 6 Treaty of Friendship between Persia and the Soviet Union,[67] and Article 4(h) Constitutive Act of the African Union[68].

The former three have between two and four parties, and permit unilateral use of force. The latter is a regional treaty setting up a collective security arrangement.[69] The validity of both

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[62] See, e.g., C. Gray, *International Law and the Use of Force*, 3rd edn. (Oxford, Oxford University Press 2008) pp. 327-366 or N. Krisch, 'Article 42', in Simma, et al., eds., *supra* n. 22, p. 1330, paras. 3-7 for an overview of cases (where authorisations have been express or implied, disputed or undisputed).

[63] Corten, *supra* n. 22, p. 256.

[64] L. Wittgenstein, *Tractatus Logico Philosophicus*, transl. by Pears and McGuinness (London, Routledge & Kegan Paul 1961) para. 6.363.

[65] Cyprus Treaty of Guarantee (adopted 16 August 1960), 382 *UNTS* 8.

[66] Treaty designed to Adapt and Uphold the Friendly and Cooperative Relations between the French Republic and the Principality of Monaco (adopted 24 October 2002). This provision replaces a wider right to use force in Art. 4 of the previous treaty of 1918.

[67] Treaty of Friendship between Persia and the Soviet Union (adopted 26 February 1921), 9 *LNTS* 384. The treaty was abrogated by Iran in 1979; see W.M. Reisman, 'Termination of the U.S.S.R.'s Treaty Right of Intervention in Iran', 74 *AJIL* (1980) p. 144.

[68] Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001), 2158 *UNTS* 3.

[69] A possible definition of 'collective security' is 'a system, regional or global, in which each state in the system accepts that the security of one is the concern of all, and agrees to join in a collective response to threats to, and breaches of, the peace'; V. Lowe et al, 'Introduction', in V. Lowe, et al., *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford, Oxford University Press 2010) p. 1 at p. 13.

groups of treaties is debated.[70] They may be contrary to both the customary prohibition (because of its *jus cogens* status) and the UN Charter (because of Art. 103), or they may outside the scope of both.

The lack of consensus regarding such treaties means that they do not necessarily have a validity that needs explanation. Their validity will depend on which of the possible explanations discussed in 6 *infra* below that is correct.

Holding that use of force based on consent is legal, while use of force based on treaties is generally illegal, presupposes a distinction between consent ad hoc and permanent consent.[71] This distinction may seem arbitrary, but can be supported by the object and purpose of the prohibition as expressed in the UN Charter: The UN was established to, among other things, prevent 'war' (referred to in the Preamble), and to prevent inter-state armed conflict.[72] When a permanent consent to use force is invoked, the use of force may still be actively resisted with military means by the opposing state(s). Notable examples of this include Iraq in 1991 and Libya 2011, both of whom had consented to the military interventions against them through their ratifications of the UN Charter. This is not the case for ad hoc consent, which can be withdrawn at any time. Force based on a permanent treaty may thus, unlike force based on ad hoc consent, involve inter-state armed conflict, and may thus more readily be characterised as 'war'.[73] This distinction does not account for the 'pitched battle', where the military forces of two states meet and agree (i.e., consent) to fight each other. It is less obvious that this would be a legal exercise of consent, but the question has largely lost its practical relevance in modern warfare.

5.7 **Other exceptions: not derogations**

The much-debated doctrine of humanitarian intervention is probably not an independent ground for using armed force.[74] If it were, there would be a right to humanitarian intervention, in the

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[70] Dinstein, *supra* n. 11, para. 776 rejects the legality of such treaties outright. N. Ronzitti, 'Use of Force, Jus Cogens and State Consent', in A. Cassese, ed., *The Current Regulation of the Use of Force* (Dordrecht, Nijhoff 1986) p. 147 at pp. 157-160 is more nuanced. F. Hoffmeister, 'Cyprus', MPEPIL online, para. 23 (visited on 22 November 2013) summarises the disagreement regarding the Nicosia Treaty. C. Walter, 'Article 53', in Simma, et al., eds., *supra* n. 22, p. 1478, paras. 35-41 summarises the various views on the AU Act, and is of the view that it cannot constitute an independent grounds for using armed force. D. Kuwali, 'Protect Responsibly: The African Union's Implementation of Article 4(h) Intervention', 11 *YIHL* (2008) p. 51 at pp. 68-70, is undecided. E. De Wet, 'Regional Organisations and Arrangements and Their Relationship with the United Nations: The Case of the African Union', SSRN <ssrn.com/abstract=2279555> (2013), at p. 15 seems open to the future emergence of a right to intervention by the AU. Corten, *supra* n. 22, pp. 256-257 claims that 'the peremptory character of the rule … precisely precludes' such treaties.

[71] Orakhelashvili, *supra* n. 44, p. 7; Cassese, *supra* n. 12, p. 371; ILC, *Fourth Report on Responsibility of International Organizations, by Giorgio Gaja, Special Rapporteur* (2006) para. 48 explicitly subscribe to this distinction, writing that only ad hoc consent, and not permanent consent, is legal.

[72] Art. 1(1) refers to 'international peace and security'. The corresponding phrase in Art. 39 has since been expanded to cover conflicts that are less international in scope, see, e.g., N. Krisch, 'Article 39', in Simma, et al., eds., *supra* n. 22, p. 1272, paras. 12-39

[73] Corten, *supra* n. 22, pp. 254-255 makes a similar point.

[74] Randelzhofer and Dörr, *supra* n. 22, paras. 52-57 give an overview of the debate. Spiermann, *supra* n. 11, presents an interesting case for its legality.

form of a general customary rule that would cover all who are bound by the prohibition of the use of force. It could thus not be a derogation from the prohibition of the use of force. The debate over humanitarian intervention is rather a question of the scope of the prohibition. It therefore does not require any further explanation here.

The same is the case for a possible right to use force in the protection of nationals abroad,[75] if such a right is distinct from the right to self-defence.[76]

6. ARTICLE 42 UN CHARTER: POSSIBLE EXPLANATIONS

6.1 **Introduction**

This section will examine different possible explanations for why the Article 42 of the UN Charter, which authorises the use of force, can be valid even though the prohibition of the use of force is (said to be) a *jus cogens* rule.

The following possibilities are discussed:

- That article 42 reflects a customary international law exception from the prohibition (*infra* 6.2)
- That treaties permitting the use of force are outside the scope of the prohibition (*infra* 6.3)
- That force authorised by a collective security organ is outside the scope of the prohibition (*infra* 6.4)
- That force authorised by the UNSC specifically is outside the scope of the prohibition (*infra* 6.5)
- That only a prohibition of 'aggression', and not the prohibition of the use of force, is *jus cogens* (*infra* 6.6)
- That the prohibition of the use of force is a special form of *jus cogens* that permits certain kinds of derogation (*infra* 6.7)
- That the UN Charter is above *jus cogens* (*infra* 6.8)
- That the prohibition is not *jus cogens* after all (*infra* 6.9)

The conclusion drawn in 7 *infra* is that the most plausible explanation is that force authorised by the UNSC is outside the scope of the prohibition.

6.2 **Article 42 reflects customary exception**

Article 42 UN Charter is an exception from Article 2(4). It is possible that it, similarly to Article 51, reflects an exception from the customary prohibition. The exception would have to be a *jus*

[75] The existence of such a right is discussed by O. Dörr, *supra* n. 47, paras. 43-45.
[76] Both possibilities are discussed by Gray, *supra* n. 62, pp. 156-160.

cogens rule, in order to affect the *jus cogens* prohibition.[77] This would mean that a rule similar to Article 42 was customary law, i.e., binding on all states. One consequence of this would be that the UNSC could authorise the use of force against non-UN members.

The ICJ stated in *Nicaragua* that 'the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law'.[78] These 'essentials' may include Article 42, but that is not clear. However, later in the same paragraph, the Court noted that 'the principle of non-use of force … may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security', which might be taken to imply that the UN Charter's collective security provisions are not to be considered customary law alongside the prohibition on use of force.

An exception reflecting Article 42 would have to be created by state practice and *opinio juris*. With the existence of the UN Charter, UN member states using force on the basis of the Charter would simply be obeying the Charter, and not simultaneously generating state practice in favour of the existence of a concurrent customary rule.[79] State practice would have to be generated by non-members. For example, this is one explanation for why the ICJ in the *Nicaragua* case found that the reporting requirement in Article 51 UN Charter was not part of customary law.[80]

While the UNSC often formulates resolutions towards all states, which may imply the inclusion of non-members,[81] and has made 'demands on actors other than United Nations Member States and inter-governmental organizations',[82] it is not obvious that the UNSC has (or should have) competence-competence with regards to its own powers over entities that have in no way consented to its powers. More decisively, there is no established practice of non-members heeding the UNSC's decisions; a notable example is Switzerland's practice of not considering itself bound by them prior to becoming a UN member.[83]

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[77] Its existence and *jus cogens* status is assumed by Linderfalk 2007, *supra* n. 3, p. 864, and apparently by Orakhelashvili, *supra* n. 4, p. 50, who argues that *jus ad bellum* 'as a whole' (presumably including the Art. 42 UN Charter) is *jus cogens*.

[78] *Nicaragua*, *supra* n. 20, para. 188.

[79] *North Sea Continental Shelf*, Judgment, *ICJ Reports* (1969) p. 3, para. 76. On the other hand, the International Committee of the Red Cross' study on customary international humanitarian law did not limit itself to non-parties of relevant treaties (J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge, Cambridge University Press 2009) p. l).

[80] *Nicaragua*, *supra* n. 20, para. 200.

[81] A. Peters, 'Article 25', in Simma, et al., eds., *supra* n. 22, p. 787, paras. 32-33.

[82] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *ICJ Reports* (2010) p. 403, para. 116.

[83] Peters, *supra* n. 81, paras. 32-33. E. David, 'Article 34: Convention of 1969', in O. Corten and P. Klein, eds., *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford, Oxford University Press 2011) p. 887, para. 13 and M. Oberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ', 16 *EJIL* (2006) p. 879 at p. 885 agree that non-members are not bound. C. Henderson and N. Lubell, 'The Contemporary Legal Nature of UN Security Council Ceasefire Resolutions', 26 *Leiden JIL* (2013) p. 369 at pp. 393-394 suggest that they may be.

That non-members are not bound by UNSC decisions is also supported by the ICJ's statement in *Namibia* that non-members are 'not bound by Article 25 and 26 of the Charter'.[84]

The most plausible inference from all this is that Article 42 UN Charter does not reflect customary international law.

6.3 **Treaties are outside scope**

An alternative explanation could be that the customary prohibition does not cover use of force that is based on a treaty.[85] Combined with the fact that force by ad hoc consent is also outside the prohibition's scope, this would result in an unusual construction: a prohibition of the use of force that is non-derogable, i.e., that cannot be derogated by treaty or consent, but that does not prohibit uses of force based on either treaty or consent.

State practice supporting this version of the customary prohibition would consist of states creating treaties authorising the use of force and obeying these, and *opinio juris* would consist of states considering this legal. This is different from the situation discussed in 6.2 *supra*. There, states' adherence to a treaty did not create state practice suggesting the existence of a customary rule with the same content as the treaty. Here, states' adherence to a treaty creates state practice suggesting that the treaty itself is valid.

The UN Charter permits use of force under a collective security system. It has been invoked many times, and generally been obeyed and considered legal.[86] Another example of a collective security treaty is Article 4(h) Constitutive Act of the African Union, though its validity is disputed.[87] Other collective security treaties, such as the North Atlantic Treaty[88] and the Collective Security Treaty[89], do not include independent bases for using armed force. As noted in 5.6 *supra*, there are some examples of other treaties authorising use of force, but their validity is debated. The divided nature of that debate reduces the plausibility of this explanation.

6.4 **Authorised force is outside scope**

A narrower possibility is that the customary prohibition does not cover use of force that has been authorised by collective security organs. This would cover use of force authorised by the UNSC or on the basis of Article 4(h) Constitutive Act of the African Union.

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[84] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *ICJ Reports* (1971) p. 16, para. 126.

[85] This is assumed by Randelzhofer and Dörr, *supra* n. 22, paras. 67-68; Dörr, *supra* n. 47, para. 33; Spiermann, *supra* n. 11, p. 535. Paulus and Leiß, *supra* n. 48, at fn. 52 describe 'the *ius cogens* prohibition on the *unilateral* use of force', which may mean that use of force authorised by treaty is bilateral and thus legal. G. Marston, ed., 'United Kingdom Materials on International Law 1986', 57 *BYIL* (1987) p. 487 at p. 616, para. II.9 assumes that treaties and consent authorising the use of force are equally valid.

[86] See *supra* 5.5.

[87] See *supra* n. 70.

[88] North Atlantic Treaty (adopted 4 April 1949, entered into force 24 August 1949), 34 *UNTS* 243.

[89] Charter of the Collective Security Treaty Organization (adopted 7 October 2002), 2235 *UNTS* 79.

However, the validity of Article 4(h) AU Constitutive Act seems to be as controversial as that of the other treaties. There thus seems to be little basis for distinguishing between collective security and other treaties.

6.5 **The UNSC is outside scope**

Alternatively, it is possible that use of force that has been authorised by the UNSC falls outside the scope of the customary prohibition.[90] Article 42 UN Charter would then not be a derogation from the customary prohibition, as it would not be covered by it in the first place.

Unlike the explanation discussed in 6.2 *supra*, that Article 42 reflects a customary exception, the possibility that use of force authorised by the UNSC is outside the scope of the customary prohibition does not mean that the UNSC can authorise use of force towards non-members of the UN. The force would have to be authorised on the basis of the UN Charter, which, unlike the customary exception envisaged in 6.2 supra, is not binding on non-members. This means that this possibility avoids the problem created by lack of state practice and *opinio juris* described in 6.2 *supra*.

As noted in 6.2 *supra*, state practice and *opinio juris* in support of Article 42 being customary international law would have to be generated by non-UN members, since members would only be complying with the UN Charter. This is not the case for state practice and *opinio juris* in support of UNSC-authorised force being outside the scope of the prohibition, which can instead be generated by both members and non-members of the UN. Both groups generally consider UNSC-authorised force legal. This means that, unless another explanation is equally or more plausible, UNSC-authorised force is legal because it is outside the scope of the prohibition of the use of force.

The idea of a general customary rule excluding a single specific organ (rather than something more general) is unusual. The plausibility of this explanation is nonetheless supported by the fact that the UN Charter established the prohibition of the use of force and the possibility of the UNSC authorisation at the same time, as part of a single unified system. The UNSC's powers to authorise use of force are thus an inherent part of the prohibitions of the use of force,[91] which could justify this distinction between the UN Charter and other treaties attempting to authorise the use of force.

6.6 **Only 'aggression' is *jus cogens***

6.6.1 *Introduction*

A different possibility is that the scope of the *jus cogens* customary prohibition is limited to 'aggression', and that use of force of force authorised by the UNSC is outside the scope of 'aggression'. This implies that there also exists a separate customary prohibition of the use force, which would not be *jus cogens*. Article 42 UN Charter would then only be a derogation from the non-*jus cogens* rule, which would explain its validity.[92]

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[90] This is assumed by Corten, *supra* n. 22, p. 256.
[91] Corten, *supra* n. 22, p. 256; Schrijver, *supra* n. 27, pp. 460-461 make similar points.
[92] This explanation is put forward by Ronzitti, *supra* n. 70, pp. 150, 153 and 159.

Anyone claiming that (only) a prohibition of 'aggression' is *jus cogens* may implicitly subscribe to this explanation, since 'aggression' is usually not intended to be synonymous with 'use of force'.[93]

This potential explanation raises three questions:

1. Is there a distinction between aggression and use of force?
2. Is use force authorised by the UNSC outside the scope of aggression?
3. Is only the prohibition of aggression, and not the prohibition of the use of force, *jus cogens*?

6.6.2 *Distinction between aggression and use of force*

The first question is whether there is a distinction between 'aggression' and 'use of force'.

The ICJ in *Nicaragua* explicitly distinguished between 'aggression' and 'less grave forms of the use of force',[94] i.e., apparently confirming that there is a distinction.

The ICJ moreover noted in *Barcelona Traction* that the prohibition of 'aggression' is an *erga omnes* rule (see *supra* 3), which implies that there is indeed a prohibition of aggression that is separate from the prohibition on the use of force.

'[A]n act of aggression' is mentioned as one condition for UNSC intervention in Article 39 UN Charter. It is, however, only of three alternative conditions with the same legal consequence, which means that it has not been necessary for the UNSC to give it a precise content. The term has been invoked in few cases,[95] and these have done little to clarify its meaning.

The UN General Assembly's Definition of Aggression defined aggression as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'.[96] The ICJ in *Nicaragua* recognised a different section of this resolution as reflecting customary international law.[97] The resolution's wording mirrors Article 2(4) UN Charter, which apparently means that the General Assembly considers all use of force that violates Article 2(4) to be aggression. If so there is no distinction between the two concepts.

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[93] Examples include recent documents from the ILC: DARS with commentaries, *supra* n. 22, p. 85; ILC *Fragmentation*, *supra* n. 22, para. 33 both speak of 'aggression'. Earlier ILC document have been less consistent: ILC, *supra* n. 17, p. 248 speaks of 'a treaty contemplating an unlawful use of force contrary to the principles of the Charter' as being contrary a *jus cogens* rule. ILC, *ILC Yearbook* (1980-I) p. 183 mentions 'less serious uses of force' not being *jus cogens*, which necessitates multiple rules. ILC, *ILC Yearbook* (1979-I) p. 38 says that '[i]f armed forces entered the territory of another State, characterization of that act as a breach of a peremptory norm must inevitably depend on the circumstances, which would include the question of consent by the State concerned'. The statement is unhelpful to the present discussion, since it does not specify the basis for why consent can make use of force legal. Cassese, *supra* n. 12, p. 202 concurs that aggression is *jus cogens*, but adds that a broader prohibition of threat or use of force is *jus cogens* as well. Linderfalk 2013, *supra* n. 3, p. 374 cites DARS with commentaries, *supra* n. 22, when speaking of '[engaging] in aggressive war' as prohibited by a *jus cogens* rule.

[94] *Nicaragua*, *supra* n. 20, para. 191.

[95] Gray, *supra* n. 62, p. 197.

[96] Art. 1 GA Res. 3314, *supra* n. 39, Annex.

[97] *Nicaragua*, *supra* n. 20, para. 195, regarding Art. 3(g) of the definition.

A similar definition has been adopted for the Statute of the International Criminal Court: 'the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations'.[98] The ICC Statute distinguishes 'aggression' from the 'crime of aggression', which has a narrower definition and is aimed at individuals rather than states. The latter, the *crime of* aggression, is defined as 'an act of aggression which … constitutes a manifest violation of the Charter of the United Nations'.[99]

The General Assembly's definition also states that 'aggression is the most serious and dangerous form of the illegal use of force',[100] which should mean that not all illegal use of force is aggression. This was relied on by the Separate Opinion of Simma in the *Armed Activities* case, which seems to base the distinction between aggression and other uses of force on 'scale and impact'.[101] The General Assembly's definition also allows the UNSC to 'conclude that a determination that an act of aggression has been committed would not be justified' if 'the acts concerned or their consequences are not of sufficient gravity',[102] which supports the view that not all illegal use of force is aggression.

Writers seem to take the position that 'aggression' is a narrower concept than 'use of force',[103] and that their apparent equation in the Definition of Aggression does not reflect current customary international law.

Thus the most plausible conclusion is that there are distinct prohibitions regarding 'use of force' and 'aggression'. The content of the separate prohibition of aggression is discussed in the next subsection.

6.6.3 *UNSC outside scope of aggression*

The next question is whether use of force authorised by the UNSC is outside the prohibition of 'aggression'.

The UN General Assembly's Definition of Aggression, which seems to equate 'aggression' and 'use of force', implies that use of force that does not violate the UN Charter is not aggression, by saying that it shall not 'be construed as in any way enlarging or diminishing

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[98] Art. 8, para. 2 Resolution RC/Res.6, Adopted at the 13th plenary meeting, on 11 June 2010, by consensus, amending the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered in force 1 July 2002), 2187 *UNTS* 90, Annex. The definition is, however, not in force.

[99] Ibid., Art. 8, para. 1.

[100] GA Res. 3314, *supra* n. 39, Annex preamble. Y. Dinstein, 'Aggression', MPEPIL online, para. 33 (visited on 22 November 2013) also seems to regard aggression as something narrower than merely illegal uses of force when asking 'whether aggression in that sense is conceivable in circumstances not amounting to an armed attack' (since not all illegal use of force amounts to an 'armed attack', as per *Nicaragua*, *supra* n. 20, para. 195).

[101] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), Judgment, *ICJ Reports* (2005) p. 168, Separate Opinion of Judge Simma, at para. 2-3.

[102] Art. 2 GA Res. 3314, *supra* n. 39, Annex.

[103] Ruys, *supra* n. 43, p. 138 notes 'a cascading relationship between the terms "use of force", "aggression" and "armed attack"', while C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge, Cambridge University Press 2013) p. 96 concludes that only 'serious' uses of force qualify as aggression.

the scope of the Charter, including its provisions concerning cases in which the use of force is lawful'.[104] That would mean that use of force authorised by the UNSC would indeed be outside the scope of the prohibition of aggression. The narrower definitions of 'aggression' discussed in the previous section also exclude UNSC-authorised force.

Thus use of force authorised by the UNSC is outside the scope of the prohibition of aggression, regardless of the debate over the term's meaning.

6.6.4 *Only aggression as* jus cogens

The last question whether only the prohibition of aggression, and not that of the use of force, is *jus cogens*.[105] One fundamental problem is that statements recognising the prohibition of the use of force as *jus cogens* are generally not limited to aggression. Thus the ICJ in *Nicaragua* spoke of 'the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations' as *jus cogens*, which would include the prohibition of the use of force as such and not just aggression. State practice seems to follow the same line, with states not limiting their *jus cogens* statements to aggression.[106]

6.6.5 *Conclusion*

It seems plausible to claim that there is a distinction between use of force and aggression, and also to claim that force authorised by the UNSC is outside the scope of aggression. However, the idea that only a prohibition of aggression, and not that of the use of force, is *jus cogens* does not seem plausible under current state and judicial practice.

Another problem with assuming that only a prohibition of aggression is that it complicates the law. The construction of two similar rules with radically different legal statuses may be susceptible to the principle of 'Ockham's Razor'.[107]

6.7 **Special *jus cogens***

Jus cogens rules are rules with special properties, most notably that they cannot be derogated from by consent or treaty (*supra* 2). Like regular customary rules, *jus cogens* rules are created through state practice and *opinio juris.* A *jus cogens* rule is created when the state practice and *opinio juris* in question says that the rule is to be non-derogable.

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[104] Art. 6 GA Res. 3314, *supra* n. 39, Annex.
[105] Schrijver, *supra* n. 27, p. 460 notes that this is claimed by some writers.
[106] Corten, *supra* n. 22, p. 251, referring to an overview at pp. 201-207. At pp. 251-252, Corten further points out that according to states and the ILC, consent justifies any use of force regardless of its gravity. This, however, is not incompatible with the possibility that there is a distinction between use of force and aggression and that only the prohibition of the latter is *jus cogens*. Use of force based on consent would by definition be outside the scope of 'aggression' and thus not be a derogation from a *jus cogens* rule, irrespective of gravity.
[107] The principle is named for William of Ockham, but has been posited in various ways by various people. One formulation of it is that a simple solution is, all else being equal, more plausible than a complicated one.

It is also imaginable that the state practice and *opinio juris* creating a specific rule could say something else, creating individual *jus cogens* rules with unique attributes. For example, it has been suggested that the specific *jus cogens* rule prohibiting the use of force may be derogated only through treaties establishing 'central authorities', such as the UNSC.[108] That would explain the validity of Article 42 UN Charter.

The main objection against this solution is its novelty. *Jus cogens* is generally recognised as a unitary concept with a given content. The only basis for assuming that new categories of *jus cogens* have been established seems to be the fact that Article 42 UN Charter exists and is considered valid. As has been shown in the previous sections, the validity of Article 42 can be explained by simpler means.

6.8 **The Charter is above *jus cogens***

The UN Charter is a treaty. It is nonetheless a special treaty, which (perhaps arguably) acts as a constitutional document for the current world order.[109] This may mean that the Charter is not, unlike other treaties, subject to the limitations imposed by *jus cogens* rules. This would mean that the UN Charter's derogation from the prohibition of use of armed force is valid even though the prohibition is *jus cogens*.

The VCLT offers no guidance on the question: Articles 53 and 64 make no exception for the UN Charter when stating that treaties must conform to *jus cogens*, but Article 4 says that the VCLT does not regulate treaties older than the VCLT itself, including the Charter. Logically, it should not be possible for UN member to confer on the UN any powers that they themselves do not possess, including the power to violate *jus cogens* rules. In a Separate Opinion in the ICJ's *Genocide* case, judge E. Lauterpacht argued that *jus cogens* prevails over the Charter.[110] The same was held by the European Court of Justice in its *Kadi I* and *Yusuf and Al Barakaat* cases.[111] There seems to be wide agreement on this view in the literature as well.[112]

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[108] This is claimed by C. Leben, 'Obligations Relating to the Use of Force and Deriving from Peremptory Norms of International Law', in J. Crawford, et al., eds., *The Law of International Responsibility* (Oxford, Oxford University Press 2010) p. 1197 at p. 1202.

[109] E.g., J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (Oxford, Oxford University Press 2009) p. 23; B. Fassbender, 'The United Nations Charter as the Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) p. 529; B. Sloan 'The United Nations Charter as a Constitution', 1 *Pace YIL* (1989) p. 61; P-M. Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', 1 *Max Planck Yearbook of United Nations Law* (1997) p. 1; B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) p. 1 at p. 18.

[110] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, *ICJ Reports* (1993) p. 325, Separate opinion of Judge Lauterpacht, at para. 100.

[111] Case T-315/01 *Kadi I* [2005] *ECR* II-364, paras. 227-231; Case T-306/01 *Yusuf and Al Barakaat* [2005] *ECR* II-3533, paras. 278-282.

[112] See Paulus and Leiß, *supra* n. 48, fn. 53, with further references (including the ILC and domestic courts), as well as A. Orakhelashvili, *Collective Security* (Oxford, Oxford University Press 2011) p. 57; Orakhelashvili, *supra* n. 4, pp. 423-424; M. Wood, 'United Nations, Security Council', MPEPIL online, para. 18 (visited on 22 November 2013).

From a *lex ferenda* point of view, if the UN Charter is above *jus cogens*, the UNSC could legally adopt resolutions that contravene *jus cogens*, which would be binding on the UN's member states. That is not an enticing prospect. More generally, intergovernmental organisations should be held to the same basic *jus cogens* standards as states.

The conclusion is that the UN Charter is and should be subject to the limitations imposed by *jus cogens* rules.

6.9 **The prohibition is not *jus cogens***

A final possibility is that the customary prohibition of the use of force is not *jus cogens*.[113] This would be a straightforward explanation of why it can be validly derogated by Article 42 UN Charter.

The main objection to this explanation is that it is contrary to the near universal view outlined in 3 *supra*.

On a *lex ferenda* level, arguments exist both for and against the proposition that the prohibition is *jus cogens*.

Jus cogens is a morally charged concept.[114] *Jus cogens* status can be seen as giving a rule an exalted position, making it normatively 'better' than other rules. That there seems to be broad agreement on the prohibition of the use of force's status as *jus cogens*, yet only scattered and somewhat contradictory explanations of how that claim can be logically valid, may suggest that the agreement is based more on moral considerations than on legal analysis. It should nonetheless be possible to separate the law from the morals; a rule can be important (which is a political and moral aspect) even though it may be derogated from (which is more of a technical legal point).

There is also a need for coherence in international law. The main consequence of a rule being *jus cogens* is that it cannot be derogated from, neither by treaty nor consent. Yet in practice, using of force based on both consent and treaties is largely permitted. Depending on which explanation(s) is chosen for this apparent anomaly, the claim that the prohibition is *jus cogens* is more or less without consequence: A rule that says '*The use of armed force is illegal, unless permitted by consent or treaty. This rule cannot be derogated from by consent or treaty*' makes little sense.

The concept of *jus cogens* thus risks being emptied of content and being reduced to an academic and/or political buzzword. It would slide further towards either of the Scylla and Charybdis of 'apology' and 'utopia':[115] If states are allowed to claim that a rule is *jus cogens* while they unhesitatingly derogate from it, international law becomes a mere explanation of state action, offering no independent resistance ('apology'). If academics debate which norms of international law are the most 'important', and label these *jus cogens*, despite the fact that states consistently derogate from the same norms, international law is reduced to an academic exercise of moral philosophy ('utopia').

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[113] Green, *supra* n. 16 suggests this, but does not explicitly support it.

[114] Linderfalk 2007, *supra* n. 3, p. 871 suggests (as one of several possibilities) that this may currently be its only function, i.e., that it is not a legal concept.

[115] See M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2nd edn. (Cambridge, Cambridge University Press 2006) regarding these terms.

However, even if both consent and treaties can permit the use of force, there will still be various other effects of the customary prohibition having *jus cogens* status (see *supra* 2.3).

A 'compliance pull' would generally be a good thing.

The prohibition would also be more difficult to change, but it is not clear that this is unequivocally either good or bad. It can protect the prohibition from dilution, from concepts such as humanitarian intervention, anticipatory self-defence, self-defence against non-state actors, and force based on permanent consent.[116] It may also, however, prevent timely and necessary developments, which in the long run may undermine the respect for the prohibition.

Preclusion of self-defence and necessity would be irrelevant, since these are already regulated at the primary rule level (see *supra* 5.3). Preclusion of distress and force majeure does not seem to have much practical importance. Preclusion of persistent objection would also be relatively unimportant.

The obligations of third states resulting from grave violations of *jus cogens* rules could, however, be significant. An illegal use of force may significantly weaken or even obliterate the injured state, which would make third-state obligations to combat the violation and not to recognise its outcome essential. Those obligations were, for example, observed after Iraq's forcible occupation of Kuwait in 1990.[117]

No state immunity for and the right to universal jurisdiction over illegal uses of force is another possible consequence, but, as noted in 2.3 *supra*, this can be achieved regardless of *jus cogens* status.

7. CONCLUSION

This article has shown that the apparent derogations from the prohibition of the use of force are in fact not derogations. Most of them have clear explanations: Self-defence reflects a customary exception, while consent and the UNCLOS provisions are outside the scope of the prohibition. With regard to Article 42 UN Charter, several explanations are (more or less) plausible. That uses of force authorised by the UNSC are outside the scope of the prohibition seems to be the most plausible of them.

Even though one explanation looks more plausible than the others, the question remains open and debatable. The debate will have consequences for the validity of other treaties, most importantly Article 4(h) Constitutive Act of the African Union. The choice may also affect, and be affected by, whether the UNSC can impose obligations on non-member states of the UN.

Those who make or accept the claim that the customary prohibition is a *jus cogens* rule should specify which explanation(s), among the ones discussed above or others, the claim is based on. This should at least be done by writers who aim to give an objective and exhaustive account of the law. (States, on the other hand, may have good reasons for deliberately obscuring their legal reasoning.) It is possible to accept or make the claim that the rule is *jus cogens* without giving an explanation, by assuming and/or implying that at least of them is correct without taking a stance on which one, but this leaves any legal argument involving the claim incomplete.

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[116] Orakhelashvili, *supra* n. 44, pp. 7-12.
[117] Cassese, *supra* n. 12, p. 203.